

THE DUTY TO CONSULT IN CASE SARAYAKU v. ECUADOR

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Summary

Throughout Latin America, extractive industries have profound cultural, environmental and social impact on indigenous peoples and their traditional way of life. In 2012, the Inter-American Court of Human Rights ruled that states parties to the American Convention on Human Rights have international obligation to consult resident indigenous communities before granting rights for exploration and exploitation of natural resources within their territories. This article puts forward international legal developments that Sarayaku decision has introduced with respect to the state's duty to consult.

Keywords: *duty to consult, indigenous rights, Inter-American Court of Human Rights, international law, Ecuador, Latin America*

1. INTRODUCTION

In the Amazon region, indigenous peoples lead what appears to be a never-ending battle against encroachment by mining and oil companies. An important victory finally came in 2012 when the Inter-American Court of Human Rights issued a historic ruling in *Kichwa Indigenous People of*

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Sarayaku v. Ecuador,¹ a case that marked a new twist to the conflict between indigenous communities and corporative oil interests in Ecuador's Amazon rainforest. The Court ruled against Ecuador, finding that the state had breached both international and domestic law by granting oil concession to a private company on indigenous land without prior consultation with the local Sarayaku community. The ruling has a far-reaching impact on indigenous peoples throughout Latin America because it asserts that state sponsored expansion of extractive activities cannot be attained without a free, prior and informed consultation process. The Court, compared to its previous judicial decisions and existing international human rights instruments, sets out stricter standards for states to ensure indigenous peoples' effective participation in development and investment projects affecting their property rights.

2. ANALYSIS

Regarding the duty to consult, through this case, the Inter-American Court of Human Rights (hereinafter „the IACtHR“ or „the Court“) has concluded that the duty to consult constitutes a general principle of international law; has noted that it is a non-delegable obligation of the state; has made a connection between the duty to consult and the right to cultural identity; and has elaborated in concrete terms on *Saramaka* consultation criteria. After providing the factual and legal context of the case, these elements of the Court's decision will be analysed in detail. Although the Court did not touch upon the issue of consent, it will be briefly presented as to understand the scope of the duty to consult.

¹ IACtHR, Case of the *Kichwa Indigenous People of the Sarayaku v. Ecuador*, Judgment of 27 June 2012 (Merits and Reparations), Series C, No. 245. All IACtHR decisions are available online at <http://www.corteidh.or.cr/cf/jurisprudencia2/index.cfm?lang=en> [visited: 11 May 2020]. For an overview of the case, see Carasco Herencia, S., Public Interest Litigation in the Inter-American Court of Human Rights: The Protection of Indigenous Peoples and the Gap between Legal Victories and Social Change, *Quebec Journal of International Law, Special Edition*, 2015, pp. 199-220.

2.1. Background of the Case

In 1996, Ecuador signed a contract with Argentinian private oil company, Compañía General de Combustibles S.A. (hereinafter “CGC”), for hydrocarbon exploration and exploitation of crude oil in Block 23 in the Amazonian region.² Once the Environmental Impact Assessment was approved by the Ministry of Energy and Mines,³ the contract stipulated a four-year seismic phase followed by a twenty-year exploitation phase.⁴ The territory granted for concession was inhabited by several indigenous communities, with Sarayaku holding around 65% of the territory included in Block 23.⁵ However, the concession was granted with no prior consultation with Sarayaku people even though Ecuador legally recognized title to their lands in 1992 while reserving the right to subsoil natural resources for itself.⁶ Due to protests, the project was suspended in order to develop community relations with affected communities. During the suspension period, CGC had tried several strategies to obtain Sarayaku's approval for oil exploration such as forming support groups for the oil exploration activities, paying people to recruit others who might support oil project, bribing community members with medical care, gifts, money, jobs and other benefits that were turned down by the Sarayaku people.⁷ Nevertheless, in 2002, after updated Environmental Management Plan was approved, CGC finally started seismic survey on indigenous land supported with Ecuadorian Armed Forces. The company laid down seismic lines, set up seven heliports, destroyed caves, water sources and underground rivers needed to provide drinking water for the community, cut down trees and plants of great environmental and cultural value, and used for subsistence food by the Sarayaku.⁸ Also, with Ecuador's acquiescence and protection, CGC planted around 1400 kilograms of high-power explosives, both on the surface and at deeper levels, and left them scattered across the territory that comprised Block 23.⁹ Placement of explosives created a permanent situation of risk and threat to the life and

² *Ibid.*, para. 62.

³ *Ibid.*, para. 69. CGC subcontracted a private company to conduct the EIA that was approved by Ministry of Energy and Mines in 1997 but it was never put in practice.

⁴ *Ibid.*, para. 66.

⁵ *Ibid.*, para. 65. Also, in paragraph 52, the Court describes Sarayaku's territory as one of the most biologically diverse in the world.

⁶ *Ibid.*, paras. 62 and 149.

⁷ *Ibid.*, para. 73.

⁸ *Ibid.*, para. 105.

⁹ *Ibid.*, para. 101.

physical integrity of group's members.¹⁰ The oil company's activities led to the sporadic suspension of the Sarayaku's ancestral cultural rites and ceremonies, prevented them from seeking means of subsistence and limited their rights to freedom of movement and cultural expression.¹¹

In 2003, after unsuccessful application for constitutional protection (*amparo*), the Kichwa People of Sarayaku, Centro de Derechos Económicos y Sociales and Center for Justice and International Law submitted a petition to the Inter-American Commission on Human Rights alleging that Ecuadorian government unlawfully permitted the oil company to carry out its activities on tribe's ancestral land without prior consultation. The Inter-American Commission on Human Rights referred the case to the Court¹² in 2010 for adjudication, after Ecuador failed to comply with its recommendations.

Ecuador was found responsible for failure to conduct proper consultation process which resulted in violation of the right to communal property and to cultural identity, in the terms of Article 21 (Right to Property) and in relation to Article 1(1) (Obligation to Respect Rights) and Article 2 (Domestic Legal Effects) of the American Convention on Human Rights (hereinafter "the American Convention").¹³ The IACtHR also found that Ecuador had violated Articles 4(1) (Prohibition of Arbitrary Deprivation of Life) and 5(1) (Right to Physical, Mental, and Moral Integrity), Article 8(1) (Right to a Hearing Within Reasonable Time by a Competent and Independent Tribunal) and Article 25 (Right to Judicial Protection), in relation to Article 1(1) of the American Convention.

¹⁰ *Ibid.*, para. 248.

¹¹ *Ibid.*, paras. 2, 105, 174, and 218.

¹² The Organization of American States (OAS) established the Inter-American Court of Human Rights in 1979 as an autonomous judicial institution whose objective is to apply and interpret the American Convention on Human Rights. The Court has two functions: a judicial function and an advisory function. The judgments of the Court are final and binding, which derives from the ratification of the American Convention and the recognition of the jurisdiction of the Court. The Court is based in the city of San José, Costa Rica. More information about the IACtHR is available on the Court's website: <http://www.corteidh.or.cr/historia-en.cfm> [visited: 4 May 2020]. For a brief review of Inter-American system of human rights, see OAS website: http://www.oas.org/en/iachr/mandate/basic_documents.asp, [visited: 9 May 2020].

¹³ American Convention on Human Rights, 22 November 1969, 1144 UNTS 123, 9 ILM 99 (entered into force 7 July 1978). Ecuador is a party to the American Convention on Human Rights and has accepted compulsory jurisdiction of the IACtHR on all matters relating to interpretation and application of the said Convention.

*The State, by failing to consult the Sarayaku People on the execution of a project that would have a direct impact on their territory, failed to comply with its obligations, under the principles of international law and its own domestic law, to adopt all necessary measures to guarantee the participation of the Sarayaku People, through their own institutions and mechanisms and in accordance with their values, practices, customs and forms of organization, in the decisions made regarding matters and policies that had or could have an impact on their territory, their life and their cultural and social identity, affecting their rights to communal property and to cultural identity. Consequently, the Court finds that the State is responsible for the violation of the right to communal property of the Sarayaku People recognized in Article 21 of the Convention, in relation to the right to cultural identity, in the terms of Articles 1(1) and (2) of this instrument.*¹⁴

As part of reparation measures, the Court ordered Ecuador to deactivate and remove all explosives left on the surface and buried in the territory of the Sarayaku People; consult the Sarayaku in any future projects or activities that either have an impact on the Sarayaku territory or affect essential aspects of their worldview or their life and cultural identity; adopt, within a reasonable time, any legislative, administrative or other type of measures that may be necessary to effectively implement the Sarayaku's right to consultation and amend those measures that prevent its full and free exercise; conduct, within a reasonable time, a training program to inform public officials of indigenous people's rights under national and international law; pay pecuniary and non-pecuniary damages; publish the judgment and carry out a public act of acknowledgment of international responsibility.

2.2. Findings by the Court

2.2.1. The Duty to Consult as a General Principle of International Law

In determining violation of the right to property in Article 21 of the American Convention, the main question before the IACtHR was whether the state had an obligation to guarantee the right to consultation of the Sarayaku People. The IACtHR applied the ILO Convention Concerning Indigenous and Tribal Peoples in Independent

¹⁴ Sarayaku v. Ecuador, *supra* note 1, para. 232.

Countries No. 169 (hereinafter „the ILO Convention No. 169“),¹⁵ understood as a principal international source of legal obligations for states with respect to indigenous peoples¹⁶ and to which Ecuador is a party. In its Article 6(1)(a) it obliges states to *consult* the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly. Furthermore, Article 6(2) requires consultations to be undertaken “in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.”

A key issue concerned the moment when, according to international law, the state’s obligation to consult with the indigenous community arose. Ecuador ratified the ILO Convention No. 169 in 1998,¹⁷ two years after the contract with CGC had been signed. Ecuador argued that, when signing the oil exploration and exploitation contract, it was under no obligation to initiate a prior consultation process with the Sarayaku community, since at that time it had not yet ratified the ILO Convention No. 169 and because the Constitution¹⁸ contained no provision in this regard. Whereas the IACtHR reaffirmed the traditional presumption against retroactivity of treaties, it recognized that the ILO Convention No. 169 applied to any subsequent impacts and decisions resulting from oil projects, even when

¹⁵ International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, 28 ILM 1382 (entered into force 5 September 1991). Since the American Convention does not contain specific provisions on protection of indigenous rights, the IACtHR applied the ILO Convention No. 169 under the scope of Article 29(b) of the American Convention. In paragraph 164 of the Judgment, the Court recalled that it could “address the interpretation of a treaty provided it is directly related to the protection of human rights in a Member State of the inter-American system, even if that instrument does not belong to the same regional system of protection.” Apart from the ILO Convention No. 169, the UN Declaration on the Rights of Indigenous Peoples is another important international instrument in the area of consultation, but it is not legally binding. UN Declaration on the Rights of Indigenous Peoples (UNDRIP), GA Res. 61/295, 61st Sess., UN Doc. A/RES/61/295, 2 October 2007.

¹⁶ Olivares Alanís, E. C., *Indigenous Peoples' Rights and the Extractive Industry: Jurisprudence From the Inter-American System of Human Rights*, *Goettingen Journal of International Law*, Vol. 5, No. 1, 2013, p. 191.

¹⁷ Sarayaku v. Ecuador, *supra* note 1, para. 70.

¹⁸ Ecuador’s 1998 Constitution in its Article 57 (7) introduced the right of indigenous people to free, prior and informed consultation.

the latter had been contracted prior to its entry into force.¹⁹ Importantly, it was not until 2002 that CGC commenced its seismic survey activities, at which point the ILO Convention No. 169 had already entered into force. Therefore, the IACtHR concluded that Ecuador had international obligation regarding the right to consultation „at least from May 1999“²⁰ when the ILO Convention No. 169 entered into force in Ecuador, even though this occurred after the contract with CGC had been signed.

Ultimately, the IACtHR recognized the duty to consult not only as a treaty norm, but also as a general principle of international law.²¹ The IACtHR noted that nowadays there has been a clearly recognized obligation to consult indigenous people through special and differentiated consultation processes whenever the rights and interests of indigenous peoples can be affected, based on an extensive analysis of its own jurisprudence, recent developments in legislation and jurisprudence within Inter-American system,²² various international instruments and the fact that even countries that haven't ratified the ILO Convention No. 169 have also referred to the need to carry out prior consultations with indigenous communities.²³ According to Article 38(1)(c) of the Statute of International Court of Justice, general principles of law constitute international source of law in addition to international conventions, international custom and other subsidiary sources. The IACtHR's recognition of the obligation to consult as a general principle of international law is all the more noteworthy in that it is „the world's only human rights body to have issued legally-binding judgments on resource extraction in indigenous territories“.²⁴ *Sarayaku* has thus strengthened the international standard with regards to the duty to consult creating an international legal obligation for states to consult with its indigenous communities regardless of whether they have ratified international instruments that contain such obligation.

¹⁹ *Sarayaku v. Ecuador*, *supra* note 1, para. 176.

²⁰ *Ibid.*

²¹ *Ibid.*, para. 164.

²² The IACtHR examined the national legislation and rulings of the high courts in OAS member states.

²³ See *Sarayaku v. Ecuador*, *supra* note 1, paras. 159-165.

²⁴ Antkowiak, T. M., Rights, Resources and Rhetoric: Indigenous People and Inter-American Court, *University of Pennsylvania Journal of International Law*, Vol. 35, No. 1, 2013, p. 120.

2.2.2. The Duty to Consult is the Exclusive Responsibility of the State

In its thematic report, the Inter-American Commission on Human Rights warned of widespread practice in countries that form Inter-American system where the state responsibility to conduct consultation had been transferred to private companies.²⁵ This „*de facto* privatization of state responsibility“²⁶ has proved to have detrimental effects on local indigenous communities.²⁷ *Sarayaku* was the first decision where the Court held in no uncertain terms that the duty to consult indigenous peoples belongs exclusively to the state. Therefore, the obligation can not be avoided by its delegation to a private company or to third parties, as it was done in the present case, and „much less to the very company that is interested in exploiting the resources in the territory of the community that must be consulted.“²⁸ In this way, the Court has closed the legal gap left open in the ILO Convention No. 169.

Ecuador acknowledged that it had not carried out a proper prior consultation process.²⁹ Nonetheless, it tried to present activities carried out by CGC, including its environmental impact assessment study and related

²⁵ Inter-American Commission on Human Rights, *Indigenous and Tribal People's Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II.Doc. 56/09, 30 December 2009, para. 291, available at: <https://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf> [visited: 18 April 2020]. See De Casas, I. C., The Corporate Responsibility to Respect Consultation Rights in the Americas: How the Inter-American System Can Better Promote Free, Prior, and Informed Consent, in: Feichtner, I. et al., *Human Rights in Extractive Industries: Transparency, Participation Resistance*, Springer, Cham, Switzerland, 2019, p. 267-269.

²⁶ Inter-American Commission on Human Rights, *Indigenous and Tribal People's Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, *supra* note 25, para. 291.

²⁷ UN Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, James Anaya, UN Doc. A/HRC/12/34, 15 July 2009, para. 36 (in his Report, Professor James Anaya states that that a lack of adequate consultation leads to conflictive situations, with indigenous expressions of anger and mistrust, which, in some cases, have spiralled into violence). For instance, the Shuara tribe in Peru was so dissatisfied with the lack of consultation that they blockaded the Morona River, Amazon Watch, Indigenous Blockade River, Thwart Talisman Operations in Peru's Amazon, available at: <https://amazonwatch.org/news/2011/0920-indigenous-blockade-river-thwart-talisman-operations-in-perus-amazon> [visited: 10 May 2020].

²⁸ *Sarayaku v. Ecuador*, *supra* note 1, para. 187.

²⁹ *Ibid.*, paras. 23 and 189.

activities that it described as “socialization”, as a proper form of consultation. This led to a peculiar situation where, instead the state itself, the very same company interested in oil extraction „had sought an understanding“³⁰ with indigenous communities only with the intention to legitimate its oil exploration activities. Comprehensive reading of this section of the Judgment leads one to conclude that the IACtHR did not find the oil company's *de facto* conduct of consultation problematic per se, but rather the fact that it was not supervised by the state due to the lack of any kind of measures³¹ to monitor the process that would ensure the respect of rights of the Sarayaku People. The IACtHR held that even when indigenous groups reach an agreement with private individuals, the state must play a monitoring role to ensure that indigenous rights are not ignored.³² Further guidance on this issue will have to be looked in future cases but in any event it is always the state that bears the ultimate responsibility for any inadequacy in the consultation or negotiation procedures.³³

2.2.3. Right to Cultural Identity and the Duty to Consult

The IACtHR has long recognized that the profound spiritual relationship of the indigenous peoples with their ancestral lands and nature as a whole, requires a unique consideration. It was explained for the first time in case *Yakye Axa Indigenous Community v. Paraguay* that „the culture of the members of the indigenous communities directly relates to (...) their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity.”³⁴

³⁰ *Ibid.*, paras. 130, 178 and 200. Also, in paragraph 75, the Court noted that Ecuador did not contest Sarayaku's allegations that CGC hired a team of sociologists and anthropologists whose job was to divide communities, manipulate the leaders, and carry out defamation campaigns to discredit the leaders and organizations who opposed extraction activities.

³¹ *Ibid.*, para. 189.

³² *Ibid.*, para. 167.

³³ Anaya, S. J., Puig, S., *Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples*, *University of Toronto Law Journal*, Vol. 62, No. 4, 2017, p. 24.

³⁴ IACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005 (Merits, Reparations and Costs), Series C, No. 250, paras. 135 and 137. *See*

In further support of the right to cultural identity, the *Sarayaku* judgment refers to various international instruments, out of which it considers particularly relevant the ILO Convention No. 169³⁵ and the UN Declaration on the Rights of Indigenous Peoples.³⁶ Although it is not explicitly named in the American Convention on Human Rights, the IACtHR has repeatedly connected in its jurisprudence the right to cultural identity to the right of property as laid out in its Article 21.³⁷ Due to the Court's inclusive interpretation of the content of Article 21, the term "property" goes beyond its usual civil law meaning and is to be understood as covering "those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value."³⁸ In the context of indigenous rights, the right to cultural identity has become a component of the right to property and is, thus, safeguarded by the American Convention on Human Rights.³⁹ Likewise, it has been established that the unique bond

also IACtHR, Case of the *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of 24 August 2010 (Merits, Reparations and Costs), Series C, No. 214, para. 174; and IACtHR, Case of the *Saramaka People v. Suriname*, Judgment of 28 November 2007 (Preliminary Objections, Merits, Reparations and Costs), Series C, No. 172, paras. 82 and 95.

³⁵ See Article 13(1) of the ILO Convention No. 169, *supra* note 15: "In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship."

³⁶ UN Declaration on the Rights of Indigenous Peoples (UNDRIP), *supra* note 15.

³⁷ Antkowiak, T. M., *op. cit.* note 24, p. 150. See IACtHR, Case of the *Mayagna Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001 (Merits, Reparations and Costs), Series C, No. 79, para. 149; IACtHR, Case of the *Yakye Axa Indigenous Community v. Paraguay*, *supra* note 34, para. 135; and IACtHR, Case of the *Saramaka People v. Suriname*, *supra* note 34, paras. 121 and 122.

In a partially Dissenting Opinion in Case of the *Yakye Axa v. Paraguay*, Judge A. Abreu Burelli emphasized that: "As regards the American Convention, the right to cultural identity, while not explicitly set forth, is protected in the treaty based on an evolutionary interpretation of the content of the rights embodied in its Articles 1(1), 5, 11, 12, 13, 15, 16, 17, 18, 21, 23 and 24, depending on the facts of the specific case. In other words, the right to cultural identity is not abridged every time one of said articles is breached".

³⁸ IACtHR, Case of the *Mayagna Awas Tingni Community v. Nicaragua*, *supra* note 37, para. 144.

³⁹ Carasco Herencia, S., *op. cit.* note 1, p. 219. See *Sarayaku v. Ecuador*, *supra* note 1, para. 145 (noting that „article 21 of the American Convention protects the close relationship between indigenous peoples and their lands, and with the natural resources

indigenous people have with their lands has as a consequence “that any denial of the enjoyment or exercise of their territorial rights is detrimental to values that are very representative for the members of said peoples, who are at risk of losing or suffering irreparable damage to their cultural identity and life and to the cultural heritage to be passed on to future generations.”⁴⁰ Similarly in *Sarayaku*, in finding violation of the right to property, the IACtHR observed damage to the community’s *cultural identity* due to Ecuador’s failure to consult with them.

Ecuador did not contest that the oil company damaged areas of great environmental, cultural and subsistence food value for the Sarayaku.⁴¹ This was also confirmed in public hearings by testimonies of witnesses and expert witnesses and the Court’s delegation of judges even visited the damaged areas, which was a first *in situ* visit in the history of the Court. The IACtHR entered into detail, noting, *inter alia*, that “the destruction of sacred trees, such as the Lispungu tree, by the company entailed a *violation of their worldview and cultural beliefs*.”⁴² It further described how “the oil company’s activities led to the sporadic suspension of the Sarayaku People’s ancestral cultural rites and ceremonies, such as the Uyantsa, the most important festival held every February and the seismic line passed near sacred sites used for ceremonies initiating young people into adulthood, affecting the harmony and spirituality of the community.”⁴³ As a result of these reflections, it concluded that the failure of the state to consult the Sarayaku about oil excavation and its consequences had a profound impact on their cultural identity.

The Court considers that the failure to consult the Sarayaku People affected their cultural identity, since there is no doubt that the intervention in and destruction of their cultural heritage entailed a significant lack of respect for their social and cultural identity, their customs, traditions,

on their ancestral territories and the intangible elements arising from these”); and Cavallaro, J. L. et al., *Doctrine, Practice and Advocacy in the Inter-American Human Rights System*, Oxford University Press, New York, 2019, pp. 662-676.

⁴⁰ *Yakye Axa Indigenous Community v. Paraguay*, *supra* note 34, para. 203. *See generally* on the right to cultural identity, Cavallaro, James L. et al., *supra* note 39, pp. 679-697.

⁴¹ *Sarayaku v. Ecuador*, *supra* note 1, para. 218.

⁴² *Ibid.*

⁴³ *Ibid.*

*worldview and way of life, which naturally caused great concern, sadness and suffering among them.*⁴⁴

For the first time, the IACtHR explicitly linked the right to cultural identity with the right to consult. Moreover, it considered the right to cultural identity as a *fundamental right* protected by the principle of non-discrimination established in Article 1(1) of the American Convention.⁴⁵ This creates an obligation for states to assure that the indigenous populations are adequately consulted regarding the matters that affect or can affect their cultural and social life, in conformity with their values, traditions, customs and forms of organization.⁴⁶ Significantly, the IACtHR stated that “respect for the right to consultation of indigenous and tribal communities and peoples is precisely recognition of their rights to their own culture or cultural identity.”⁴⁷ By recognizing, again, the central role the spiritual and cultural practices have for indigenous people, the Court continued to be consistent in attributing high significance to the cultural element in the interpretation of human rights standards.

2.2.4. Development of *Saramaka* Consultation Safeguards

The criteria which must be met for participatory and appropriate consultation process were previously established in *Saramaka v. Suriname* where the IACtHR found that:

- a) it must be carried out before commencement of the project;
- b) it must respect customs and traditional decision-making practices of indigenous people;
- c) it must be an informed process;
- d) it must be done in good faith with the aim of reaching agreement; and
- e) it must be accompanied by environmental impact assessment (EIA) taking account of social and cultural impact.⁴⁸

⁴⁴ *Ibid.*, para. 220.

⁴⁵ *Ibid.*, paras. 213 and 217.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, para. 159.

⁴⁸ *Saramaka v. Suriname*, Judgment of 28 November 2007, *supra* note 34, paras. 129, 133 and 134. In this case, the state granted logging and mining concessions to private

In the present case, the IACtHR restated *Saramaka* findings that community must be consulted in accordance with their own traditions, already during the *first stages* of the development or investment plan, and not only when it is necessary to obtain the community's approval.⁴⁹ The Court reaffirmed that consultation must take into account indigenous forms of decision-making.⁵⁰ This means that consultation process should be developed with traditional representative institutions, such as community assembly.⁵¹ Importantly, it is up to the indigenous groups, and not the state, to decide who will represent them in the consultation process.⁵² In *Sarayaku*, it was established that the oil company has disrespected the political structures and organization of the Sarayaku when it tried to negotiate directly with some members of the group.⁵³ Lastly, prior consultation requires that the state receives and provides information, and involves constant communication between the parties.⁵⁴

On a substantive level, an important outcome of *Sarayaku* is that, in addition to confirming the *Saramaka* consultation criteria, the IACtHR further elaborated on the meaning of several elements of the said criteria. For example, for the first time, the IACtHR underscored that the right to consultation should extend to „any administrative and legislative measures that may affect their rights, as recognized under domestic and international law.“⁵⁵ Therefore, the consultation scope now extends to a broad range of rights, and not only to those related to property. Also, the state must ensure that the rights of indigenous peoples are not ignored (...) in the context of decisions of the public authorities that would affect their rights and

companies on Saramaka's traditional lands without consulting the tribe. *See generally* on consultation, Anaya, S. J., Puig, S., *op. cit.* note 33, pp. 435-464.

⁴⁹ *Sarayaku v. Ecuador*, *supra* note 1, para. 180.

⁵⁰ *Ibid.*, para. 177.

⁵¹ *Sarayaku v. Ecuador*, *supra* note 1, para. 180. Paragraph 55 of the Judgment describes political organization of the Sarayaku community.

⁵² Anaya, S. J., Puig, S., *op. cit.* note 33, p. 25. *See* IACtHR, Case of the *Saramaka People v. Suriname*, Judgment of 12 August 2008 (Interpretation of Preliminary Objections, Merits, Reparations and Costs), Series C, No. 185, para. 18.

⁵³ *Sarayaku v. Ecuador*, *supra* note 1, para. 203.

⁵⁴ *Ibid.*, para. 208.

⁵⁵ *Ibid.*, para. 166. *See* Article 6 (1)(a) of the ILO Convention No. 169, *supra* note 15, and Article 19 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), *supra* note 15: “States shall consult with indigenous peoples in good faith and through their own representative institutions (...) *before adopting any administrative or legislative measures that may affect them*”.

interests.⁵⁶ This refers to consultation process prior to the adoption of legislative measures that could affect indigenous rights, where the indigenous peoples must be consulted in advance during all stages of the process of the producing the legislation, and these consultations must not be restricted to proposals.⁵⁷

The following paragraphs will discuss in detail how *Sarayaku* expands the aforementioned *Saramaka* criteria relating to the principle of good faith and environmental impact assessment.

2.2.5. Definition of the Principle of Good Faith

Any coercive measure applied during the consultation process violates Article 6(2) of the ILO Convention No. 169 that requires states to undertake consultations in *good faith* and in a form appropriate to the circumstances, with the objective of achieving consent or agreement on the proposed measures. Already in *Saramaka People v. Suriname*, the IACtHR made it clear that states had a duty to carry out consultations in good faith with the object of reaching an agreement, but remained silent about what exactly did the principle of good faith entail.⁵⁸ In this context, *Sarayaku* was a landmark decision because the IACtHR finally defined the content of good faith consultations and thus introduced stricter criteria for states than the vague reference made by the ILO Convention No. 169. More specifically, good faith requires the absence of any form of coercion by the State or by agents or third parties acting with its authority or acquiescence.⁵⁹

Ecuador's silent approval of CGC's coercive methods during the "socialization" process had violated good faith requirement of consultation. For example, the company offered to send a medical team to provide care in several Sarayaku communities, however, to receive care, the people would have been required to sign a list, which would have been used subsequently as a letter addressed to the CGC supporting the

⁵⁶ *Sarayaku v. Ecuador*, *supra* note 1, para. 167.

⁵⁷ *Ibid.*, para. 181.

⁵⁸ *Saramaka People v. Suriname*, Judgment of 28 November 2007, *supra* note 34, para. 133. *See e.g.*, Article 19 of the UNDRIP, *supra* note 15 (also providing that consultations must be carried out in „good faith“).

⁵⁹ *Sarayaku v. Ecuador*, *supra* note 1, para. 186.

continuation of its work.⁶⁰ Oddly enough, alleged bribery activities were not contested by Ecuador. Other CGC's practices which attempted to "undermine the social cohesion of the affected communities, either by bribing community leaders or by establishing parallel leaders, or by negotiating with individual members of the community"⁶¹ were also regarded as incompatible with good faith requirement.⁶²

While the IACtHR elaborated in detail that CGC's activities led to indigenous rights violations, it concluded that it was Ecuador's failure to conduct a serious and responsible consultation by its delegation to the private oil company and its open support to the oil exploration activities, "that encouraged, by omission, a climate of conflict, division and confrontation between the indigenous communities of the area, in particular with the Sarayaku community."⁶³ This means that a *genuine dialogue* is needed between the government and indigenous people, aimed at reaching an agreement, for a consultation process to be carried out in good faith.⁶⁴ It is worth mentioning that although the Court emphasizes the active role of the company in human rights violations, it attributes the responsibility for those breaches solely to the state as the latter is the subject of international human rights law.⁶⁵ Ecuador's responsibility for

⁶⁰ *Ibid.*, para. 73.

⁶¹ *Ibid.*, para. 186.

⁶² *Ibid.*, para. 73 of the Judgment lists CGC's questionable activities:

(a) direct contacts with members of the community, circumventing the indigenous organizational levels;

(b) offering to send a medical team to provide care in several Sarayaku communities; however, to receive care, the people would have been required to sign a list, which would have been used subsequently as a letter addressed to the CGC supporting the continuation of its work;

(c) payment of wages to specific individuals within the communities to recruit others in order to support the seismic survey;

(d) offering personal gifts and incentives;

(e) forming support groups for the oil exploration activities; and

(f) offering money, either individually or collectively.

⁶³ *Ibid.*, para. 198.

⁶⁴ *Ibid.*, para. 200. See also International Labour Office, International Labour Standards Department, *Understanding the Indigenous and Tribal People Convention, 1989 (No. 169): Handbook for ILO Tripartite Constituents*, Geneva, 2013, p. 13, available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_205225.pdf [visited: 27 April 2020].

⁶⁵ UN Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/11/13, 22 April 2009, pp. 6-8, available at:

CGC's actions derives from its due diligence obligation to prevent human rights abuses by private actors within its jurisdiction.⁶⁶ After *Sarayaku*, the IACtHR has slowly started to point towards private sector liability for human rights violations.⁶⁷

Finally, the IACtHR observed how Ecuador's employment of its armed forces and police to support CGC's oil exploration activities did not promote a climate of trust and mutual respect in order to reach an agreement between the parties.

2.2.6. Environmental Impact Assessment

Within the Inter-American human rights framework, indigenous peoples have right to manage, distribute and effectively control their ancestral territories, in accordance with their customary laws and traditional collective land tenure system.⁶⁸ However, the indigenous people's communal right to property is not absolute so the state may restrict the right to use and enjoy their traditionally owned lands and natural resources only when such restriction complies with certain requirements⁶⁹ and, additionally, when it does not endanger the very survival of the group and its members.⁷⁰ In the context of indigenous affairs, environmental impact assessment (hereinafter „EIA“) is considered as an essential safeguard to

<https://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>
[visited: 25 April 2020].

⁶⁶ IACtHR, *Case of Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988 (Merits), Series C, No. 4, paras. 164 and 172. In its first and landmark case *Velásquez Rodríguez*, the Court developed due diligence doctrine on the basis of which it built state responsibility for human rights abuses. See De Casas, I. C., *op. cit.* note 25, pp. 262-267; and Cavallaro, J. L. et al., *op. cit.* note 39, p. 349.

⁶⁷ See IACtHR, *Case of the Kaliña and Lokono Peoples v. Suriname*, Judgment of 25 November 2015 (Merits, Reparations and Costs), Series C, No. 309, para. 224.

⁶⁸ *Case of the Saramaka People v. Suriname*, Judgment of 12 August 2008, *supra* note 52, para. 48. See Article 26 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), *supra* note 15; and Article 21 of the American Convention on Human Rights, *supra* note 13. See also Inter-American Commission on Human Rights, *Indigenous and Tribal People's Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, *supra* note 25, para. 74.

⁶⁹ Olivares Alanís, E. C., *op. cit.* note 16, p. 213. See *Saramaka v. Suriname*, Judgment of 28 November 2007, *supra* note 34, paras. 127 and 129; and Article 21(b) of the American Convention on Human Rights, *supra* note 13.

⁷⁰ *Saramaka v. Suriname*, Judgment of 28 November 2007, *supra* note 34, para. 128.

ensure that restrictions imposed on the indigenous or tribal communities with regard to their right to property when concessions are granted within their territory do not entail a denial of their survival as a people.⁷¹

To begin with, the IACtHR resorted to Article 7(3) of the ILO Convention No. 169 that obliges states to ensure that necessary studies are carried out to assess social, spiritual, cultural and environmental impact of planned development activities. It reiterated its findings from the *Saramaka v. Suriname* stating that this task must be entrusted to independent and technically competent bodies which are supervised by the state.⁷²

Most importantly, it further explained that EIA should not be regarded as a mere objective measure of the possible impact on people and their territory but as a process of dialogue in which state actively engages communities in consultation and informs them about all risks, including environmental and health risks that derive from proposed development and investments plans.⁷³ Only if the indigenous communities are fully aware of all possible impacts on their lives and environment can they make decisions on proposed projects “knowingly and voluntarily.”⁷⁴ In this way, the IACtHR linked prior EIA with the state obligation to guarantee the effective participation of the indigenous people in the process of granting oil concessions. Concerning the scope of EIA's, they must conform to the relevant international standards and best practices.⁷⁵

In *Sarayaku*, the IACtHR noted that the environmental impact plan: (a) was prepared without the participation of the Sarayaku People; (b) was implemented by a private entity subcontracted by the oil company, without any evidence that it had subsequently been subject to strict control by State monitoring agencies, and (c) did not take into account the social, spiritual and cultural impact that the planned development activities might have on the Sarayaku People.⁷⁶

Furthermore, it observed that there was no evidence showing that CGC's „socialization“ activities attempted to inform Sarayaku about the results of

⁷¹ *Sarayaku v. Ecuador*, *supra* note 1, para. 205.

⁷² *Ibid.*, paras. 205 and 300.

⁷³ *Ibid.*, para. 205. See *Saramaka v. Suriname*, Judgment of 28 November 2007, *supra* note 34, para. 133.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, para. 206.

⁷⁶ *Ibid.*, para. 207.

the EIA study and advantages and disadvantages of the project in relation to their culture which consequently did not allow for the community's active participation.⁷⁷ By omitting to discuss all these matters with indigenous communities, Ecuador had violated Sarayaku's right to informed consultation.

It is worth noting that the IACtHR recalled its previous findings in *Saramaka v. Suriname* where it pointed out that EIA must take into account cumulative impact of existing projects and proposed projects.⁷⁸ According to the IACtHR, this allows for a more accurate assessment on whether the individual and cumulative effects of existing and future activities could jeopardize the survival of the indigenous or tribal people.⁷⁹

2.2.7. Consultation v. Consent

While the Court in *Sarayaku* exclusively refers to the duty to consult, it is pertinent to observe that in specific circumstances the state may be additionally obliged to obtain the *free, prior and informed consent* of indigenous peoples. For the first time, in the case *Saramaka v. Suriname*, the IACtHR held this higher obligation to be the required before authorising large - scale projects that have a significant impact on property rights on members of indigenous community.⁸⁰ By interpretation of Article 16(2) of the ILO Convention No. 169, impact is to be considered profound when it results in relocation of concerned population from lands they occupy, which, however, may be allowed only as an exceptional measure.⁸¹ It is the only occasion in the ILO Convention No. 169 when the state is actually required to seek express consent of indigenous communities. Even though Ecuador was held liable for its failure to protect right to life and physical integrity of the Sarayaku by allowing the placement of 1.5 tons of explosives on the Sarayaku's territory, the IACtHR did not acknowledge damage to their territories and the risk to life and physical integrity to constitute such impact on the Sarayaku that would result in their relocation. Such approach might have been due to Ecuador's

⁷⁷ *Ibid.*, para. 209.

⁷⁸ *Ibid.*, para. 206.

⁷⁹ *Saramaka v. Suriname*, Judgment of 12 August 2008, *supra* note 52, para. 41.

⁸⁰ *Saramaka v. Suriname*, Judgment of 28 November 2007, *supra* note 34, para. 136.

⁸¹ Article 16(2) of the ILO Convention No. 169, *supra* note 15. *See also* Articles 10 and 29(2) of the UNDRIP, *supra* note 15.

failure to satisfy even the essential requirement of consultation process, that as a consequence discouraged the IACtHR to embark upon further exploration of whether consent of the Sarayaku group should have been obtained.

The question as to whether the right to consult authorizes indigenous communities to exercise a “right of veto” over a decision made by the state concerning the exploitation of natural resources, meaning that consultations should necessarily lead to the reaching of agreement or consent,⁸² is rather controversial and remains a matter of debate.⁸³ As one

⁸² See International Labour Conference, *Committee of Experts on the Application of Conventions and Recommendations (CEACR), General Observation on Indigenous and Tribal Peoples, 81st Session, 2010*, published 2011, p. 10: “At the same time, such consultations do not imply a right to veto, nor is the result of such consultations necessarily the reaching of agreement or consent.” Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/meetingdocument/wcms_305958.pdf [visited: 2 May 2020]. See also UN General Assembly, 61st session, UN Doc. A/61/PV.107, 13 September 2007, p. 11 (reporting concerns of several countries prior to the adoption of the UNDRIP and, *inter alia*, the statement of Australian representative that “Australia cannot accept a right that allows a particular subgroup of the population to be able to veto legitimate decisions of a democratic and representative Government”), available at: <https://undocs.org/en/A/61/PV.107> [visited: 7 May 2020]. See also Peoples Dispatch, In Bolsonaro’s Brazil, Indigenous Groups are Struggling for Basic Human Rights, available at: <https://peoplesdispatch.org/2019/04/18/in-bolsonaros-brazil-indigenous-groups-are-struggling-for-basic-human-rights/> (reporting that Bolsonaro’s new Minister of Mines and Energy, Admiral Bento Albuquerque, declared plans to permit mining on indigenous land, stating that while the indigenous people will be consulted, they will not not be allowed a veto in the matter), [visited: 15 May 2020].

⁸³ *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya, supra* note 27, paras. 48-49: “In all cases in which indigenous peoples’ particular interests are affected by a proposed measure, obtaining their consent should, in some degree, be an objective of the consultations. (...) this requirement does not provide indigenous peoples with a ‘veto power’, but rather establishes the need to frame consultation procedures in order to make every effort to build consensus on the part of all concerned. (...)” For a further discussion on consent, see also Antkowiak, T. M., *op. cit.* note 24, pp. 168-171 (Antkowiak argues that “the consent requirement is only logical, as a state could not merely ‘consult’ a community about an initiative that impacts its right to life. When a community does consent to a project, the state must monitor progress and bring operations to a halt if the company exceeds the community’s acceptable level of impact”); Cabrera Ormazá, M. V., *The Requirement of Consultation with Indigenous People in the ILO: Between Normative Flexibility and Institutional Rigidity*, Brill Nijhoff, Leiden, the Netherlands, 2017, pp. 149-153; Hannum, H. et al., *International Human Rights: Problems of Law, Policy and*

author succinctly put it: “taking part in consultations knowing that one will hardly be able to oppose the outcome of the process is one thing; doing so with the awareness that the final decision might be successfully affected, or even rejected, is quite another.”⁸⁴ Yet, neither the UN Declaration on the Rights of Indigenous Peoples nor the ILO Convention No. 169 request states to obtain consent of indigenous communities but rather use less straightforward expressions such as „consult *in order to* obtain consent“⁸⁵ and „*with the objective* of reaching an agreement or consent.“⁸⁶ They also don't specify when exactly is the consent obligatory.⁸⁷ This should not be surprising as the requirements for the state to allow development activities within indigenous territories are not established in the legal documents, but by the Court in its jurisprudence, as it was done in *Saramaka* case. In its recent decisions, the IACtHR did not engage in further discussion on consent. For this reason, it remains to be seen in the future cases to what extent will the IACtHR strengthen its *Saramaka* standard relating to consent and how will it elaborate on the meaning of a „large – scale project.“

3. CONCLUSIVE REMARKS

Latin American states have a relatively poor record in securing effective consultation with indigenous people in regard to extractive activities on their lands. Strategic status of extractive industries in generating national economic development and the need to secure foreign investments, have led governments to disregard the environmental, social and cultural impacts extractive projects have on traditional indigenous way of life.

Practice, Wolters Kluwer, 6th edition, New York, 2018, pp. 172-175; and Olivares Alanís, E. C., *op. cit.* note 16, pp. 209-213.

⁸⁴ Barelli, M., Development Projects and Indigenous Peoples' Land: Defining the Scope of Free, Prior and Informed Consent, in: Lennox, C., Short, D., *Handbook of Indigenous Peoples' Rights*, Routledge, Oxford, 2015, p. 71.

⁸⁵ Article 19 of the UN Declaration on the Rights of Indigenous Peoples, *supra* note 15. See Barelli, M., Free, Prior and Informed Consent in the UNDRIP: Articles 10, 19, 29(2) and 32(2) in Hohmann, J., Weller, M., *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, Oxford University Press, Oxford, 2018, pp. 250-256.

⁸⁶ Article 6 (1)(a) of the ILO Convention No. 169, *supra* note 15. See Cabrera Ormaza, M. V., *op. cit.* note 83, p. 67.

⁸⁷ It is important to note that consent requirement in Articles 10 and 29(2) of the UNDRIP refers to relocation and storage and disposal of hazardous waste.

Against this background, the Inter-American Court of Human Rights has broken new ground with its *Sarayaku* ruling that has established much more stringent consultation safeguards than existing international human rights instruments concerning indigenous peoples. Most notably, the Court finally clarified content of legal obligations of the state when carrying out consultation process with the population concerned. It addressed important questions of delegability of the duty to consult, meaning of the good faith principle and the purpose of the EIA, all of which proved to be highly contentious in state practice. The Court has also shown a great deal of cultural sensitivity towards indigenous peoples. With its progressive and comprehensive interpretation of indigenous rights, the IACtHR has remained true to its own words that „human rights treaties are living instruments (...) and must reflect current living conditions.“⁸⁸ The importance of the *Sarayaku* consultation standard has been further reaffirmed through the recent IACtHR’s jurisprudence concerning development induced violations of indigenous rights.⁸⁹ For companies operating in extractive industry, the decision stands as a clear reminder that there can be no development activities within indigenous territories if proper prior consultation has not taken place.

While the judgment has generated unprecedented interest in Latin America and the human rights standards it set up are to be adopted by other states parties to the American Convention,⁹⁰ the enforcement of the judgment in Ecuador has been, to say the least, very problematic.⁹¹ Eight years after the

⁸⁸ *Sarayaku v. Ecuador*, *supra* note 1, para. 161.

⁸⁹ See Case of the *Kaliña Lokomo Peoples v. Suriname*, *supra* note 67; IACtHR, Case of *Garífuna Triunfo de la Cruz Community v. Honduras*, Judgment of 8 October 2015 (Merits, Reparations and Costs), Series C, No. 305, para. 158 (only available in Spanish), and IACtHR, Case of *Garífuna Triunfo de la Punta Piedra Community v. Honduras*, Judgment of 8 October 2015 (Preliminary Objections, Merits, Reparations and Costs), Series C, No. 304, para. 216 (only available in Spanish).

⁹⁰ See Kadelbach, S. et al., *Judging International Human Rights: Courts of General Jurisdiction as Human Rights Courts*, Springer, Cham, Switzerland, 2019, p. 310 (noting that “the Court, however, under the control of conventionality doctrine, requires all States Parties to the American Convention to conform their domestic laws to all the judgments and reasoning of the Court, not simply those in which the state was a party to the case”).

⁹¹ According to Article 30 of the Statute of the Inter-American Court of Human Rights, the Court submits the Report to General Assembly where it indicates cases where the state has failed to comply with the Court’s ruling but there is no mechanism that supervises execution of Court’s decisions. See IACtHR Resolution on Oversight of Compliance with the Judgment, issued on 22 June 2016, available at:

landmark ruling, Ecuadorian government has failed to fully comply with the judgment.⁹² In November 2019, the Sarayaku brought an action before the Constitutional Court against Ecuador due to its lack of compliance. The long battle for indigenous rights continues, but this time on the national level.

BIBLIOGRAPHY

BOOKS

1. Cabrera Ormaza, M. V., *The Requirement of Consultation with Indigenous People in the ILO: Between Normative Flexibility and Institutional Rigidity*, Brill Nijhoff, Leiden, 2017.
2. Cavallaro, J. L., Vargas, C., Sandoval, C., Duhaime, B., Bettinger-López, C., Erin Brewer, S., Guzman, D., Naddeo, C., *Doctrine, Practice and Advocacy in the Inter-American Human Rights System*, Oxford University Press, New York, 2019.
3. Hannum, H., Shelton, D., Anaya, J. S., Celorio, R., *International Human Rights: Problems of Law, Policy and Practice*, Wolters Kluwer, 6th edition, New York, 2018.
4. Kadelbach, S., Rensmann, T., Rieter, E., *Judging International Human Rights: Courts of General Jurisdiction as Human Rights Courts*, Springer, Cham, Switzerland, 2019.

ARTICLES

1. Anaya, S. J., Puig, S., Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples, *University of Toronto Law Journal*, Vol. 62, No. 4, 2017, pp. 435-464.
2. Antkowiak, T. M., Rights, Resources and Rhetoric: Indigenous People and Inter-American Court, *University of Pennsylvania Journal of International Law*, Vol. 35, No. 1, 2013, pp. 113-187.
3. Barelli, M., Development Projects and Indigenous Peoples' Land: Defining the Scope of Free, Prior and Informed Consent, in:

<http://www.corteidh.or.cr/docs/supervisiones/SCS/ecuador/sarayaku/sarayakup.pdf> (only in Spanish), [visited: 13 May 2020].

⁹² For more information on the *Sarayaku v. Ecuador* case, see the following website of the Centro por la Justicia y el Derecho Internacional: <https://cejil.org/es/sarayaku> [visited: 6 May 2020].

- Lennox, C., Short, D., *Handbook of Indigenous People's Rights*, Routledge, Oxford, 2015, pp. 69-82.
4. Barelli, M., Free, Prior and Informed Consent in the UNDRIP: Articles 10, 19, 29(2) and 32(2), in: Hohmann, J., Weller, M., *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, Oxford University Press, Oxford, 2018, pp. 247-273.
 5. Carasco Herencia, S., Public Interest Litigation in the Inter-American Court of Human Rights: The Protection of Indigenous Peoples and the Gap between Legal Victories and Social Change, *Quebec Journal of International Law, Special Edition*, 2015, pp. 199-220.
 6. De Casas, I. C., The Corporate Responsibility to Respect Consultation Rights in the Americas: How the Inter-American System Can Better Promote Free, Prior, and Informed Consent, in: Feichtner, I., Krajewski, M., Roesch, R., *Human Rights in Extractive Industries: Transparency, Participation Resistance*, Springer, Cham, Switzerland, 2019, pp. 247-281.
 7. Olivares Alanís, E. C., Indigenous Peoples' Rights and the Extractive Industry: Jurisprudence From the Inter-American System of Human Rights, *Goettingen Journal of International Law*, Vol. 5, No. 1, 2013, pp. 187-214.

LEGAL SOURCES

1. American Convention on Human Rights, 22 November 1969, 1144 UNTS 123, 9 ILM 99 (entered into force 7 July 1978).
2. International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, 28 ILM 1382 (entered into force 5 September 1991).
3. UN Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, 61st Sess., UN Doc. A/RES/61/295, 2 October 2007.

CASE LAW

1. IACtHR, Case of the *Kichwa Indigenous People of the Sarayaku v. Ecuador*, Judgment of 27 June 2012 (Merits and Reparations), Series C, No. 245.
2. IACtHR, Case of the *Kaliña and Lokono Peoples v. Suriname*, Judgment of 25 November 2015 (Merits, Reparations and Costs), Series C, No. 309.

3. IACtHR, Case of the *Mayagna Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001 (Merits, Reparations and Costs), Series C, No. 79.
4. IACtHR, Case of the *Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005 (Merits, Reparations and Costs), Series C, No. 250.
5. IACtHR, Case of the *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of 24 August 2010 (Merits, Reparations and Costs), Series C, No. 214.
6. IACtHR, Case of the *Saramaka People v. Suriname*, Judgment of 28 November 2007 (Preliminary Objections, Merits, Reparations and Costs), Series C, No. 172.
7. IACtHR, Case of the *Saramaka People v. Suriname*, Judgment of 12 August 2008 (Interpretation of Preliminary Objections, Merits, Reparations and Costs), Series C, No. 185.
8. IACtHR, Case of *Garífuna Triunfo de la Cruz Community v. Honduras*, Judgment of 8 October 2015 (Merits, Reparations and Costs), Series C, No. 305.
9. IACtHR, Case of *Garífuna Triunfo de la Punta Piedra Community v. Honduras*, Judgment of 8 October 2015 (Preliminary Objections, Merits, Reparations and Costs), Series C, No. 304.
10. IACtHR, Case of *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988 (Merits), Series C, No. 4.

WEB SOURCES

1. Organization of American States webpage: http://www.oas.org/en/iachr/mandate/basic_documents.asp [visited: 9 May 2020].
2. UN Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/11/13, 22 April 2009, available at: <https://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf> [visited: 25 April 2020].
3. International Labour Conference, Committee of Experts on the Application of Conventions and Recommendations (CEACR), General Observation on Indigenous and Tribal Peoples, 81st Session, 2010, published 2011, available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---

- normes/documents/meetingdocument/wcms_305958.pdf [visited: 2 May 2020].
4. UN General Assembly, 61st session, UN Doc. A/61/PV.107, 13 September 2007, available at: <https://undocs.org/en/A/61/PV.107> [visited: 7 May 2020].
 5. International Labour Office, Understanding the Indigenous and Tribal People Convention, 1989 (No. 169): Handbook for ILO Tripartite Constituents, Geneva, 2013, available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_205225.pdf [visited: 27 April 2020].
 6. Inter-American Commission on Human Rights, Indigenous and Tribal People's Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System, OEA/Ser.L/V/II.Doc. 56/09, 30 December 2009, available at: <https://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf> [visited: 18 April 2020].
 7. Webpage of Centro por la Justicia y el Derecho Internacional, available at: <https://cejil.org/es/sarayaku> [visited: 6 May 2020].
 8. Webpage of the IACtHR, available at: <http://www.corteidh.or.cr/cf/jurisprudencia2/index.cfm?lang=en> [visited: 11 May 2020].
 9. Amazon Watch, Indigenous Blockade River, Thwart Talisman Operations in Peru's Amazon, available at: <https://amazonwatch.org/news/2011/0920-indigenous-blockade-river-thwart-talisman-operations-in-perus-amazon>, visited on 10 May 2020.
 10. IACtHR, Resolution on Oversight of Compliance with the Judgment, issued on 22 June 2016, available at: <http://www.corteidh.or.cr/docs/supervisiones/SCS/ecuador/sarayaku/sarayakup.pdf> (only in Spanish) [visited: 13 May 2020].
 11. Peoples Dispatch, In Bolsonaro's Brazil, Indigenous Groups are Struggling for Basic Human Rights, available at: <https://peoplesdispatch.org/2019/04/18/in-bolsonaros-brazil-indigenous-groups-are-struggling-for-basic-human-rights/> [visited: 15 May 2020].

OBVEZA SAVJETOVANJA U PREDMETU SARAYAKU PROTIV EKVADORA

Jelena Vlahušić

Sažetak

Diljem Latinske Amerike, ekstraktivne industrije imaju znatni kulturni, ekološki i društveni utjecaj na domorodačko stanovništvo i tradicionalni način života. U 2012. godini, Međuamerički sud za ljudska prava odlučio je da države stranke Američke konvencije o ljudskim pravima imaju međunarodno-pravnu obvezu savjetovanja s domorodačkim zajednicama prije dodjele prava na istraživanje i eksploataciju prirodnih resursa na domorodačkim teritorijima. Članak iznosi pravne pomake koje je odluka u predmetu Sarayaku uvela u odnosu na državnu obvezu savjetovanja.

Ključne riječi: obveza savjetovanja, domorodačka prava, Međuamerički sud za ljudska prava, međunarodno pravo, Ekvador, Latinska Amerika.